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October 20, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338

Reply Comments of McLeodUSA Telecommunications Services, Inc.

Dear Ms. Dortch:

Enclosed please find a corrected version of the Reply Comments of McLeodUSA Telecommunications Services, Inc. Apart from minor, non-substantive changes to Section I of the Reply Comments, this filing is identical to the document that filed with the Commission on October 19, 2004.

Regards,

Jonathan S. Frankel
Counsel for McLeodUSA Telecommunications Services, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))	CC Docket No. 01-338

REPLY COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

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October 19, 2004

SUMMARY

The Commission must define "mass market" from "enterprise" customers and not expand broadband unbundling relief to include enterprise customers. McLeodUSA suggests that "mass market" customers should be defined as residential and small home office customers. This is the market within which ubiquitous intermodal competition actually exists for local telephony services from cable and/or wireless service providers based on recent FCC data. Alternatively, the "mass market" should be defined as customers with fewer than four lines based on facts contained in the recent Small Business Administration survey of small business customers.

The best, objective evidence for use by the Commission in this docket is contained in the QSI Study, which compiled the facts and evidence presented by RBOCs and CLECs in the state *TRO* proceedings. This data has been subject to at least a minimal amount of scrubbing by all parties and state commissions.

Regarding impairment standards, the Commission should reaffirm its impairment standard and granular analysis that is consistent with both *USTA I* and *USTA II*. The Commission should reject any impairment standard based on special access. The Commission also should reject the use of MSAs as an appropriate market definition, because it will lead to a high incidence of false conclusions in violation of *USTA II*.

Competitors rely on access to DS0 loops, which are sacrosanct. As the Supreme Court recognized, competitors cannot economically or practically replicate the ubiquitous "last mile" local facilities and thus remain impaired without continued access to DS0 loops..

Facts from the *TRO* docket confirm that competitors remain impaired without continued access to DS1 and DS3 loops and transport. The Commission should adopt national findings of impairment for these elements, because the fundamental economics and barriers to entry prevent

competitors from deploying their own facilities as determined in the *TRO*. The FCC should reaffirm impairment standards based on capacity levels or, in the alternative, adopt an objective, three-tiered transport test based on business access lines as a revenue proxy for determining whether competitors economically could justify deploying their own fiber facilities.

Rules concerning batch hot cut processes should be implemented to ensure an orderly transition from UNE-P to UNE-L and promotion of intramodal, facilities-based competition. Minimum federal standards should be adopted to ensure consistency across markets. The standards should include, among other things, CLEC to CLEC conversions. A suggested batch size of 100 to 125 orders per CLEC per Central office per day is reasonable. Finally, the FCC should establish a pricing methodology based on TELRIC that addresses the non-recurring and monthly recurring charges.

Special access should not be a proxy for just and reasonable pricing. The wireline industry fundamentally differs from the CMRS industry. Therefore, special access should be irrelevant to any impairment analysis used in permanent unbundling rules.

DS1 EELs should be treated as a separate UNE, which will help promote rational facilities-based investment and extend the competitive choices for consumers. In addition, competitors are impaired without access to entrance facilities.

Finally, States should have authority to order unbundling and set pricing for Section 271 UNEs. There remains an independent unbundling obligation under Section 271 regardless of whether a specific element is no longer a Section 251 element.

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CASES

USTA I	*United States Telecom Ass'n v. FCC* , 290 F.3d 415, 425-426 (D.C. Cir. 2002)
USTA II	*United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)
Verizon	*Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002)

FCC AUTHORITIES

Interim UNE Order	*In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004)
TRO	*Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003)
UNE Remand Order	*See Implementation Of The Local Competition Provisions Of The Telecommunications Act Of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701, para. 7 (1999)
Pricing Flexibility Order	*Access Charge Reform*, CC Docket No. 92-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999)
Local Competition Order	*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No 96-98, First Report and Order 11 FCC Rcd 15499 (1996)

EX PARTES

Ad Hoc Users Report	Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, CC Docket No. 01-338 (filed August 26, 2004) (attaching white paper entitled "Competition in Access Markets: A Reality or Illusion.")
Qwest Aug. 20, 2004 *Ex Parte* Letter	Letter from Cronan O'Connell, Vice-President-Federal Regulatory, Qwest, to Marlene Dortch, Secretary, FCC, CC Dockets Nos. 01-338, 98-147, 96-98 (filed August 20, 2004)
SBC Aug. 18, 2004 *Ex Parte* Letter	Letter from Christopher M Heimann, General Attorney, SBC, to Marlene Dortch, Secretary, FCC, CC Dockets Nos. 01-338, 98-147, 96-98 (filed Aug. 18, 2004)
XO Petition	XO Communications Inc.'s Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers are Impaired without DS1 UNE Loops, WC Docket No. 04-313, CC Docket No. 01-338 (filed Sep. 29, 2004)
Pac-West Sep. 7, 2004 *Ex Parte* Letter	Letter from Richard Rindler, Swidler Berlin Shereff Friedman, LLP to Marlene Dortch, Secretary, FCC, CC Docket 01-338, 96-98, 98-147 (filed Sep. 7, 2004).

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REPLY COMMENTS OF
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") files its reply comments in the above-captioned proceedings.

I. COMMISSION SHOULD NOT EXPAND BROADBAND UNBDUNDLING RELIEF TO ENTERPRISE CUSTOMERS

A. "Mass Market" Should Be Limited To Residential and Home Office Customers, the Customer Classes For Which Ubiquitous Intermodal Competition For Local Telephony Services Exists

McLeodUSA suggests that the Commission define mass market customers as residential and small home office customers. The rationale for treating the mass market differently from the enterprise market segment is that mass market customers enjoy ubiquitous intermodal competitive choices. Today, the only market segment within which ubiquitous intermodal competition actually exists for local telephony services is the residential and small home office customer class, in the form of alternative cable and/or wireless service providers. In addition, a small home office customer is consistent with the Commission's conception in the *TRO* of a "very small" business. This would also be consistent with the Commission's previous decision to limit FTTH relief to "predominantly residential" premises, since the fact that business activities are conducted within a home does not change the fact that the premises is still a home. On this basis, McLeodUSA believes that the number of lines used by the customer is a less relevant and useful definitional distinction, and the Commission should focus on residential and home office customers.

RBOCs incorrectly argue that cable companies are competing for business customers who require high capacity voice and data services that only can be provided over DS1 and high capacity facilities. The RBOCs assert in their "Fact" Report that "[a]n estimated 41 percent of large businesses (1,000+ employees), 32 percent of mid-sized businesses (100-999 employees), and 44 percent of small businesses (5-99 employees) are using cable modem service for at least **some** high-capacity services."[1] Assuming *arguendo* that "some" estimated number of businesses are using "some" cable modem services, there is not record evidence that these services are used for anything more than Internet access service or video. Nor is there record evidence that businesses are substituting cable modem service for DS1 and high capacity telecommunications services that small, medium and large businesses require. In fact, if cable modem services really were considered by business customers as comparable to DS1 level services, small, medium and large business owners would not be willing to pay significantly more for a DS1 circuit than the cost of a cable modem connection. Unfortunately, the RBOC positions in this docket are not based on evidentiary record data that actually supports their contentions.

Other "intermodal alternatives" suggested by some RBOCs are even more poorly supported by the record. For example, Wi-Max wireless access is a new technology that is predominantly limited to residential consumers in concentrated urban areas. There is not current evidence that Wi-Max is scaleable and replicable making it a viable alternative for enterprise

[1] RBOC "UNE Fact Report 2004" at I-10 (emphasis added); Verizon Comments at 51.

customers. Nor have other fixed wireless technologies successfully replaced or even competed with the RBOCs' high capacity facilities because of the inability of CLECs to obtain the required access to building rooftops.[2] The two CLECs that made substantial investments in fixed wireless technology – Teligent and Winstar – have both gone bankrupt and have effectively withdrawn from the retail local exchange service market. The RBOCs' reliance on this nascent technology as a ubiquitous intermodal alternative is without merit and should be rejected. Accordingly, the mass market should be defined as the residential and small home office market because it is in this market, at most, where intermodal competition may exist.

B. Alternatively The "Mass Market" Should be Defined as Customers With Fewer Than Four Lines

Proposals to define the "mass market" to include all businesses with greater number of lines, including in particular Verizon's proposal to include all customers with 48 or fewer telephone lines, are flawed for numerous reasons.

First, this is not an issue that was remanded by, or even presented to, the Court of Appeals. Rather, Verizon is seeking to use this docket to request broadband relief well beyond what the Commission found justified in the *TRO,* or in the Commission's two additional decisions expanding the "fiber-to-the-home" exemption in reconsideration orders. The Commission should dismiss Verizon's request as an untimely petition for reconsideration of the *TRO*.

Second, Verizon's proposal to redefine the "mass market" is inconsistent with the unbundling paradigm the Commission adopted in the *TRO.* The Commission made clear in paragraph 210 of the *TRO* that it divided loops into "enterprise" and "mass market" categories

[2] *See* XO Comments at 35-6.

solely for the purpose of analyzing demand and supply considerations applicable to different types of loops, and *not* for the purpose of limiting which customers could be served over each type of loop. Verizon is wholly ignoring this analysis and would deny many (or all) small and medium business customers access to broadband loops based on competitive conditions in the residential market segment, a result which is entirely inconsistent with the language and policy of the 1996 Act. If the Commission nevertheless determines that a business line count is a useful screen, that count should be set at fewer than four lines, consistent with the recent survey and data endorsed by the Small Business Administration. (CITE)

Third, even if the "mass market" definition were a relevant factor, Verizon's proposed definition of that market segment has no supporting policy or factual basis. The Commission has made clear that the mass market is essentially the residential market, along with only very small business customers. While Verizon is correct that the *precise* definition of "mass market" was not established by the *TRO*, the Commission explained its intent that "[m]ass market customers consist of residential customers and *very small* business customers."[3] The *TRO* further explained that "very small" business customers are distinct from small business customers generally and "typically purchase the same kinds of services as do residential customers, and are marketed to, and provided service and customer care, in a similar manner."[4] This description of the mass market was consistent with the finding in the *UNE Remand Order* that the mass market consists "largely [of] residential customers" and that "a rule that provides access to unbundled local switching for requesting carriers when they serve customers with three lines of less captures a

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3 *TRO* at ¶ 127 (emphasis added).

4 *TRO* at n. 432.

significant portion of the mass market."[5] Therefore, there is no basis for assuming that the Commission has ever intended that the mass market encompass any significant category of business customers.

Indeed, for several years the FCC has required industry members to report competitive local and broadband data using the FCC's Form 477 – Local Competition and Broadband Reporting. In its instructions, the FCC has defined that an end user is "residential and small business if you provide *fewer than four (4) voice grade equivalent lines to that customer*.[6] To somehow recast a small business customer as having more than 3 lines at this time would be thoroughly at odds with industry practice as defined by the FCC itself for several years. That would mean a "very small" business customer has 1 or 2 lines which is consistent with a small home office customer.

Fourth, Verizon has introduced no record factual, marketing, or empirical information to justify its proposed sweeping elimination of unbundling obligations. In fact, assuming the Commission chooses to define mass market customers in terms of lines, which we believe is a second-best approach, available evidence suggests that this category should be confined to customers with fewer than four lines. As noted above, a recent report commissioned by the Small Business Administration (SBA) surveyed and analyzed the use of telecommunications services by small businesses.[7] The *SBA Survey* found that the median small business in the United States has only three employees and generates approximately $200,000 in annual

[5] *UNE Remand Order* at ¶¶ 291, 293.

[6] *E.g.*, FCC Form 477, Instructions for September 1, 2004 Filing (of data as of 6/30/04).

7 "A Survey of Small Businesses; Telecommunications Use and Spending" prepared by TeleNomic Research, LLC for the Office of Advocacy, United States Small Business Administration (March 2004), http://www.sba.gov/advo/research (last viewed October 18, 2004) ("SBA Survey").

revenues.[8] Small businesses in these categories, according to the *SBA Survey*, purchase on average 1.5 to 2.0 telephone lines each,[9] and do not purchase T-1 services.[10] If the median small business only uses 2 telephone lines, then there is no reasonable basis to interpret the definition of a "very small" business to include business that purchase more than that number of lines – much less ones that purchase services with up to 48 telephone numbers. Furthermore, if the median small business customer purchases an average of 1.5 to 2.0 telephones lines, it is reasonable to conclude that residential customers purchase as many, if not fewer, telephone lines. Therefore, Verizon's proposal to define the mass market as up to 48 lines has no credible factual basis.

Fifth, there is no policy basis for extending mass market unbundling relief to business customers. The *TRO* exempted unbundling of fiber-to-the-home and next generation hybrid loops because it wanted to provide an incentive to RBOCs to build these facilities, which at present have been deployed only in small numbers. The Commission found that "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market."[11] The Commission subsequently clarified that this unbundling relief with respect to mixed-use premises applies to loops serving "predominantly residential" customer premises.[12] The Commission's limitation of unbundling relief is consistent with the record, which shows that

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8 SBA Survey at 7-8.

9 SBA Survey at Figure 6 (Small Businesses with revenue of less than $200,000 average 1.68 local telephone lines); Figure 32 (Small Businesses with 0-4 employees average 2.03 local telephone lines).

10 SBA Survey at 11 ("the smallest of businesses do not use dedicated high-speed lines called T-1 lines").

11 *TRO* at ¶ 278.

12 *Review of the Section 251 Obligations of Local Exchange Carriers*, CC Docket 01-338, Order on Reconsideration, ¶ 4 (rel. Aug. 9, 2004).

RBOCs need no further incentives to build out broadband capabilities to enterprise customers. Whereas the Commission found that "FTTH loop deployment [to mass market customers] is still in its infancy,"[13] RBOCs have *already* deployed broadband facilities to most enterprise customers, and even where they have not, they need no special incentives to do so. Enterprise customers generally demand such capabilities, and RBOCs willingly build them without the need for additional unbundling relief from the Commission. Thus, the Commission recently concluded that "the record shows additional investment incentives are not needed" to provide RBOCs with the incentive to deploy broadband-capable loops to enterprise customers.[14] Since the RBOCs do not need any additional incentives to deploy broadband to enterprise customers, the Commission does not need to redefine the mass market to expand unbundling relief.[15]

Sixth, if RBOCs are given an opportunity to utilize the Commission's desire to promote broadband services as a means of undercutting competitors access to critical "last mile" facilities, as recently evidenced by the fiber-to-the-curb Order, the 1996 Act will be totally eviscerated. The result will be the re-monopolization of the telecom industry by the RBOCs, especially in the enterprise business markets.

Accordingly, for broadband services, McLeodUSA suggests that the Commission find impairment for all residential and small home office customers who have the benefit of ubiquitous intermodal competition for local telephony services from cable companies or wireless companies for this segment of the market. In the alternative, McLeodUSA refers the

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[13] *TRO* at ¶ 274.

[14] *Review of the Section 251 Obligations of Local Exchange Carriers*, CC Docket 01-338, Order on Reconsideration, ¶ 8 (rel. Aug. 9, 2004).

[15] While Verizon alleges that a definition that depends on telecommunications capacity could become outdated by changes in technology, capacity, if not a perfect measure, is at least a more accurate measure of the value of the services purchased by the customer and the potential profit for the carrier as compared to telephone numbers that can be assigned with little correlation to the cost or margin of such service.

Commission to the *SBA Survey* for guidance on defining the broadband mass market to consumers with fewer than four lines.

II. RBOC UNE "FACT" REPORT 2004 IS UNRELIABLE, MISLEADING AND INCOMPLETE DATA. QSI DATA BASED ON 14 STATE TRO PROCEEDINGS PROVIDES THE BEST EVIDENCE OF IMPAIRMENT

The RBOCs jointly presented a UNE "Fact" Report 2004, from which they individually propose impairment tests that would effectively eliminate all RBOC unbundling obligations for high capacity loops and transport facilities in virtually every market. Unfortunately, this report contains numerous overbroad statements, unstated assumptions, misunderstandings or intentional misrepresentation of actual information and data as to render it simply unreliable. This is certainly true with respect to information presented about McLeodUSA. McLeodUSA is one of the largest, publicly traded, independent facilities-based carriers with a significant amount of route miles of fiber and is cited often in the RBOC "Fact" Report. Yet, much of this fiber is either (a) not lit or (b) intercity fiber that could never be used as a substitute for local loops or transport between RBOC central offices in a given market, which the RBOC "Fact" Report ignores. Moreover, even McLeodUSA's intra-city fiber rings connect to substantially far fewer business premises than the RBOC "Fact" Report alleges.

Other claims about the reach of the McLeodUSA fiber network in the RBOC "Fact" Report substantially overstate the facts, or present facts that are simply meaningless when placed in the proper context. Section III of the RBOC "Fact" Report, for example, sets forth the number of CLEC route miles of fiber and the number of buildings "connected to the CLEC's fiber."[16] With respect to McLeodUSA, the RBOC "Fact" Report claims that McLeodUSA fiber is directly

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16 RBOC "Fact" Report at III-3.

connected to 1,500 buildings.[17] The "Fact Sheet" source for this data is the Year 2001 Form 10K SEC report filed by McLeodUSA.[18] That means the data cited in the RBOC "Fact" Report is three years old, and pre-dates the Company's divestiture of ILEC subsidiaries, including Illinois Consolidated Telephone Company and Dakota Community Telephone. The report also fails to identify whether any of these connections were used to serve residential customers.[19] By using outdated data, and not providing critical details, the RBOC "Fact" Report significantly overstates the number of buildings directly connected to McLeodUSA fiber network.

Today, McLeodUSA fiber actually is connected to 546 business customer locations across its 25-state footprint. The vast majority of these business locations are single customer premises, meaning that there are no other customers at that premise to whom McLeodUSA would be able to provide service using the same fiber connectivity.

More importantly, the RBOCs provide this "directly connected fiber" data without any context. These 546 business customer locations served directly by McLeodUSA on its fiber network constitute approximately 0.0357% of the total number of business buildings (546/1.529 million) in the McLeodUSA 25-state footprint.[20] In Iowa, where McLeodUSA has the majority (271) of its direct fiber connections to business customer locations, the direct connection amounts to less than 1% of the total number of business buildings (42,420) in the limited number

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17 *Id*. at III-4.

18 *Id*. at H-14.

19 McLeodUSA made a substantial investment to completely overbuild the Cedar Rapids, Iowa, local exchange market, where McLeodUSA is headquartered. Many of these direct connections included in the 1,500 building connections cited by the RBOC "Fact" Sheet are in fact residential consumer homes that were connected by this overbuild.

20 The business building data is from a D&B DMI Market Database dated September 2004. It is important to note that this business building total of 1.529 million from the D & B database significantly understates the actual number of business buildings in the RBOC territories in the 25-state McLeodUSA footprint. This universe of business buildings is limited to RBOC local exchange markets in which McLeodUSA is currently actively marketing local service. Today, McLeodUSA is actively marketing local service in less than 20% of the RBOC markets in the McLeodUSA 25 state footprint.

of Qwest's Iowa exchanges in which McLeodUSA offers local service. The RBOCs' reliance on this data as compelling evidence of extensive self-deployed CLEC fiber networks justifying the elimination of unbundled access to the RBOCs' high capacity facilities throughout their territories has no factual basis. The numbers speak for themselves when placed in context. Indeed, this data strongly supports the continuation of unbundled access to critical network elements to serve the 99.99% of the business buildings in at least the 25-state McLeodUSA footprint.

The RBOCs also misconstrue or misrepresent important terminology to support their assertions. McLeodUSA, for example, has never limited use of the term "on-net" to describe only end-to-end service offerings over 100% McLeodUSA network facilities. "On net" has always encompassed McLeodUSA's use of local switching in combination with unbundled local loops leased from an RBOC. McLeodUSA is also singled out for provisioning its own competitive loops "ranging from 128 kbps to 45 Mbps." As noted above, this is currently the case in a total of 546 instances out of a possible universe of 1.572 million premises to which McLeodUSA needs last mile access.

The RBOC "Fact" Report also cites that CLECs in some instances have fiber rings deployed as further evidence to support unbundling relief. The mere fact, however, that CLECs have fiber rings deployed within cities near commercial buildings ignores the fact that the last 100-500 feet from a fiber ring to an actual commercial building may be the most difficult and expensive to install, thereby rendering these fiber rings incapable of providing loop access to all but a very minute number of extremely large business customers. The RBOCs present no evidence to support that these fiber rings in fact represent meaningful alternatives.

The best evidence in this record regarding impairment for high capacity facilities is contained in the QSI Report, which is based on the records of the state TRO proceedings. This data, unlike the RBOC "Fact" Report, is based on publicly submitted and reviewed record data in open evidentiary proceedings. It is a reliable basis for the important decisions now before the Commission. The RBOC "Fact" Report is not.

III. The RBOCS Proposed Impairment Test Violates *USTA I* and *USTA II*

USTA I required the Commission to apply "a more nuanced concept of impairment."[21] As a result, the Commission wisely adopted a granular approach to impairment analysis in the *TRO*.[22] While the FCC's decision to delegate the analysis to the states was vacated, *USTA II* did not reject the Commission's impairment standard.[23] The Commission should reaffirm its impairment standard and granular analysis, and reject the RBOCs' suggestions that it examine impairment from more generalized, expansive perspectives.

The Commission should reject, as being overly broad, the RBOC contention that the existence of any non-UNE competition, whether by self-provisioning, third-party provisioning, use of RBOC facilities through special access, or any combination, is "dispositive" evidence of non-impairment in that market and in all similarly situated markets.[24] The RBOCs neither explain how the Commission should determine when a market is similarly situated, nor justify why the existence of one non-UNE competitor dictates the elimination of all UNEs in the entire market. The FCC also should reject any contention that intermodal carriers offer ubiquitous and

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21 *USTA I*, 290 F.3d 415, 425-426.

22 *TRO* at ¶ 118.

23 *USTA II*, 359 F.3d 554; *see also*, MCI Comments at 19; Sprint Comments at 24.

24 *See* Verizon Comments at 14-27; SBC Comments at 26-34; BellSouth Comments at 9-12; Qwest Comments at 18-31.

irreversible competition for traditional wireline services, especially for small and medium business customers in the enterprise markets.[25] The Commission should find that *USTA II* does not require an extensive examination in a market for intermodal competition because intermodal services do not offer effective alternatives in the enterprise markets.

A. The RBOC Proposal That "Competition Anywhere Equals No Impairment Everywhere" Violates *USTA I*'s Granularity Requirement

In response to the D.C. Circuit's mandate in *USTA I*, the Commission adopted a granular approach to account for differences in customer classes and geographical areas.[26] The FCC's conclusion using a location-by-location or route-by-route analysis complies with *USTA I* and is the most appropriate method to measure whether impairment exists. This localized analysis provides the most accurate results because competitive providers make business decisions based on a location-specific economic analysis.[27] In addition, customers will benefit by a localized analysis. For example, a competitor offering service to a customer at South Capital Street and Howard Road in Washington, D.C. may be impaired without access to UNEs, even though a facilities-based competitor offers service in a nearby building located at 17th and K Streets in D.C. Consequently, a customer located at the South Capital Street and Howard Road corner would not enjoy competitive alternatives if the Commission adopted the RBOC "competition anywhere equals non-impairment everywhere" approach.

The Commission also should determine that other alternative approaches for impairment are inferior to the location-by-location analysis. Specifically, the Commission should reject the assertions by Verizon and BellSouth that it define the relevant market as Metropolitan Statistical

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25 *See* Verizon Comments at 16-19; SBC Comments at 26-28; BellSouth Comments at 11-12; Qwest Comments at 34-40, USTA Comments at 9-10.

26 *TRO* at ¶ 118.

27 MCI Comments at 37.

Areas ("MSAs").[28] A broad MSA approach will produce more "false positives" and "false negatives" regarding whether competition exists.[29] For example, using the MSA approach, the existence of a facilities-based customer located at 17th and K Streets in the heart of the Washington, D.C. business district , would lead to non-impairment findings in distant locations within Washington, D.C. as well as locations well outside the DC business district. For instance, Charles Town, the county seat of Jefferson County, West Virginia, with a population of approximately 3,180 is located nearly 64 miles away from DC but within the same MSA.[30] Accordingly, rejection of the RBOC's MSA-based impairment analysis[31] is both reasonable and consistent with *USTA II*.[32]

The RBOCs further argue that the Commission should find non-impairment in any market and in all similarly situated markets where non-UNE competition exists,[33] including self-provisioning, third-party provisioning, special access tariffed offerings, or intermodal services. Such an analysis is overly broad and does not satisfy the "granular" analysis required by *USTA I* and affirmed by *USTA II*. The Commission cannot rely exclusively on the existence of non-UNE competition in a similarly situated market that may be hundreds or thousands of miles away as the only factor in its impairment analysis.

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28 Verizon Comments at 24-27; BellSouth Comments at 10.

29 AT&T Comments at 15-22.

30 *See* http://www.census.gov/population/estimates/metro-city/0312msa.txt; http://www.census.gov/popest/cities/SUB-EST2003-04.html.

31 Verizon Comments at 24-27; BellSouth Comments at 10.

32 *See USTA II*, 359 F.3d at 575 (the court recognized that "it may be infeasible" to use MSAs or other such broad markets in the impairment analysis).

33 *See* Verizon Comments at 22-24; SBC Comments at 29-30; BellSouth Comments at 10; Qwest Comments at 18-19.

The Commission also should reject the RBOCs' recommendation to apply non-impairment findings to "similarly situated markets." Not only is this concept never defined, it would, once again, likely lead to high instances of "false negatives" and "false positives." Qwest suggests that a market is similar when based on the size and similar economic characteristics.[34] This would require an endless comparison of markets across the country, with respect to a host of factors, resulting in a quagmire of disputed factual questions, litigation and the loss of all business certainty.

Finally, the Commission should reject the RBOCs' contention that the availability of special access tariffed offerings[35] and intermodal services[36] must be considered in any impairment analysis. As discussed below, special access should be deemed irrelevant to any impairment analysis. Further, intermodal services do not require an expansive examination in order to determine whether impairment exists, especially in the enterprise markets where intermodal competition for local telephony services in not widespread.

B. *USTA II* Does Not Require An Expansive Market Analysis

In *USTA II*, the court found that intermodal alternatives could not be ignored and that the Commission could determine the appropriate weight assigned to this factor in its impairment analysis.[37] Intermodal services, such as wireless and cable telephony services, arguably compete against traditional wireline services only in the residential, mass-market. In contrast, small and medium business customers are almost exclusively limited to intramodal competitive choices,

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34 Qwest Comments at 18-19.

35 Verizon Comments at 19-21; SBC Comments at 30-31; BellSouth Comments at 37; Qwest Comments at 28-30.

36 Verizon Comments at 19; SBC Comments at 26-28; BellSouth Comments at 11-12 and 20-24; Qwest Comments at 34-40.

37 *USTA II*, 359 F.3d at 572-73.

either the RBOC or CLECs. Accordingly, in the enterprise market, an impairment analysis focusing on intermodal services is not necessary.

Similarly, wireless services are not an intermodal alternative. In the *TRO*, the Commission found that wireless services are not a ubiquitous and effective competitor with wireline services for several practical reasons.[38] Wireless services are limited by quality and only "three to five percent of wireless subscribers use their service as a replacement for primary fixed wireline service."[39] Also, certain forms of wireless services, like fixed wireless, have not even been deployed on a mass-market scale.[40] Because wireless services are not a practical alternative to wireline services, their presence is not dispositive in any impairment analysis.

Similarly, the Commission should reject any RBOC contention that cable telephony forms the basis for non-impairment, especially in the enterprise markets. Cable telephony is offered primarily as a residential service, and thus, can only be considered a viable substitute for mass-market, residential consumers. A finding that CLECs were impaired because of the presence of cable telephony as an intermodal alternative in the wireline market would create a duopoly between the regional cable TV company and the RBOC in the mass market sector.[41] A duopoly is not, however, a competitive marketplace, and the Commission has not yet found sufficient competition when only two providers supply a particular service.[42]

Finally, the Commission should reject any suggestion that VoIP service is an effective intermodal facilities-based alternative. VoIP is an emerging technology that is dependent upon

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38 *TRO* at ¶ 445.

39 *Id.*; *see also*, MCI Comments at 88.

40 *Id.* at ¶ 310; *see also*, MCI Comments at 92.

41 MCI Comments at 95; Sprint Comments at 20.

42 MCI Comments at 96-97.

the RBOC's loop and transport facilities. Accordingly, VoIP service cannot be considered a substitute for traditional local exchange service because of its dependency on facilities owned by either the RBOCs or the cable companies.

IV. DS0 LOOPS SHOULD BE SUBJECT TO A NATIONWIDE FINDING OF IMPAIRMENT

In the *TRO*, the Commission found that CLECs "are generally impaired on a national basis without unbundled access to an incumbent LEC's [DS0] local loops, whether they seek to provide narrowband or broadband services, or both."[43] In support of this conclusion, the Commission found that deploying DS0 local loops for mass-market customers is "prohibitively expensive"[44] and that the costs are "largely fixed and sunk."[45] Furthermore, the relevant marketplace evidence illustrated the absence of any reasonable competitive sources of mass-market DS0 loops, and the Commission concluded that RBOCs "continue to control the vast majority of voice-grade local loops throughout the nation."[46] McLeodUSA affirmatively states that it cannot overbuild "last mile" bottleneck facilities in an economic and efficient manner, and thus remains impaired without continued unbundled access to DS0 loops.[47]

This conclusion has never been challenged by the RBOCs and was not addressed by the court in *USTA II*. Further, it was not addressed in any of the RBOCs initial comments in this proceeding. Because economic and ubiquitous intermodal alternatives to DS0 loops do not exist, unbundled DS0 loops are sacrosanct for McLeodUSA, who would be unable to serve virtually all

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[43] *TRO* at ¶ 248.

[44] *TRO* at n.716

[45] *TRO* at ¶ 237.

[46] *TRO* at ¶ 224.

[47] *See* McLeodUSA Comments, Lechtenberg Dec. at ¶ 3.

of its customers without unbundled access to these loops. Accordingly, the Commission should reaffirm its national impairment finding as to DS0 loops.

V. CLECS ARE IMPAIRED WITHOUT UNE ACCESS TO DS1 and DS3 LOOPS AND TRANSPORT

A. The FCC Should Reject Impairment Based On A MSA Market Definition Because It Violates *USTA I* and *USTA II*

The RBOCs argue that where demand for DS1 and DS3 fiber facilities is highly concentrated, impairment decisions should be based upon a MSA market.[48] For instance, the RBOC "Fact" Report claims that 80 percent of the demand for high capacity services is concentrated in 18 percent of RBOC wire centers.[49] RBOCs contend that these wire centers are located in the top MSAs of their serving areas and that demand is concentrated within large office buildings and business parks.[50] The RBOCs further contend that competitors focus on these markets when offering high capacity services because customer demand for such services is high in these areas.[51] The RBOCs rely heavily on the availability of special access or alternative fiber facilities at these locations as evidence that CLECs are not impaired throughout these MSAs.[52]

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[48] Verizon Comments at 36; SBC Comments at 64-65; Qwest Comments at 88.

[49] RBOC "Fact" Report at III-8; *see also* Verizon Comments at 36.

[50] Verizon Comments at 36; SBC Comments at 65.

[51] *See* Verizon Comments at 37; Qwest Comments at 66-71, 88; SBC Comments at 64-69.

[52] *See, e.g.*, SBC Comments at 7; Verizon Comments at 49; Qwest Comments at 80; BellSouth Comments at 36-37. In making this argument, RBOCs point to the Commission's Pricing Flexibility Order that allows RBOCs to have pricing flexibility where there is sufficient collocation by competitors in an MSA. RBOC "Fact" Report at III-31 & n. 94 (*citing* Pricing Flexibility Order); Verizon Comments at 43 (same). This test, however, is inapposite to an impairment determination because it does not examine if CLECs are impaired without access to DS1, DS3 and dark fiber loops and transport facilities to certain locations or on particular routes. For the reasons stated below, the Commission must adopt a more granular test.

The RBOCs' proposal should be rejected for numerous reasons. First, the RBOC test improperly relies on the availability of special access services. As explained elsewhere in these comments, special access is irrelevant to an impairment analysis. Second, *USTA I* requires a granular analysis and reliance on a MSA market is not granular. Third, *USTA II* cautioned that any impairment definition should define markets sensibly in a manner that minimizes false negatives, *i.e.*, erroneous findings of non-impairment. Because the RBOC proposal is non-granular it would produce exceptionally high levels of false negatives. In contrast, an impairment standard based on a capacity and route/location specific analysis is granular and accurate in evaluating whether CLECs are impaired.

To further illustrate the possibility of false negatives, assuming *arguendo* the RBOCs are correct that 80% of the demand for high capacity services is derived from 18% of RBOC wire centers located in the largest, high concentration MSAs, fiber-based collocators only are present in about half of these wire centers. Accordingly, only 9% (half) of the high concentration RBOC Wire centers have fiber-based collocators.[53] By definition the RBOCs admit there is no competitive deployment in 91% of largest high concentration MSAs. Indeed, using the RBOCs' numbers, in the remaining 91% of the high capacity wire centers with no fiber-based collocators, false negative findings of impairment would be 100%. A <u>100%</u> false negative impairment rate confirms that the RBOCs' MSAs market definition is unsound and is more prone to errors than the more granular location specific *TRO* approach.

Instead of the RBOC impairment analysis approach, the Commission should readopt the impairment approach of the *TRO* as recommended by a number of initial Commenters.[54] In the

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53 RBOC "UNE Fact Report 2004" at III-8.

54 *See generally* McLeodUSA Comments; MCI Comments at 133; Sprint Comments at 27-28.

TRO, the Commission identified two factors that determine whether impairment exists. *First*, the *TRO* held that loop and transport impairment should be determined on a capacity-specific basis.[55] *USTA II* did not address, overturn or criticize that conclusion. The *TRO* performed its impairment analysis "based on capacity level because it is a more reliable indicator of the economic abilities of a requesting carrier to utilize third-party alternatives, or to self deploy."[56] Significantly, *USTA II* did not criticize the Commission's finding that impairment differs according to the capacity of the transmission facilities and did not overturn the Commission's application of a carrier-specific, capacity-specific test. In fact, this nuanced analysis best accomplishes the Court's mandate of limiting "false negatives."

Second, the Commission held in the *TRO* that loop and transport impairment should be determined on a location and route-specific basis, respectively. This approach remains valid because entry barriers such as building access issues and access to rights of way are inherently location and route specific. Again, a route-by-route impairment analysis properly considers the economic realities associated with an impairment inquiry. A specific carrier's ability to deploy DS1 and DS3 facilities is a function of whether that carrier has sufficient traffic on a given route to justify tremendous fixed sunk costs needed to construct a facility.

Accordingly, McLeodUSA urges the Commission to reaffirm its finding that impairment be determined based on a location/route-specific and carrier-specific basis. This approach is legally sustainable because it more granular as *USTA I* required and would minimize the chances for erroneous impairment finding as *USTA II* demanded. The MSA approach proposed by the RBOCs violates current law and leads to a guaranteed high incidence of false negative results.

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[55] *TRO* at ¶¶ 307 & 376

[56] *TRO* at ¶ 376.

1. The Various RBOC Proposals Must Be Rejected Because They Rely Heavily on Special Access

a) RBOC Proposals that Request the Elimination of DS1, DS3, and Dark Fiber Loop and Transport UNEs from Wire Centers that Have 5,000 or More Business Lines Should be Rejected

Verizon and Bell South propose that loop and transport UNEs, if not eliminated entirely, should not be available in wire centers that have 5,000 or more business lines because there is slightly more than a 50% chance that the wire center has a fiber-based collocator.[57]

The RBOCs' proposals improperly rely on the availability of special access as an economically viable alternative to unbundling. The RBOCs also incorrectly assert that alternative DS1, DS3, and dark fiber loop and transport facilities have been self-deployed or are available on a wholesale basis in 53% of the wire centers where there is fiber-based collocation.[58] As discussed previously, self-provisioning such facilities at these capacity levels is not cost justified and the odds are very small that such facilities will be available on a wholesale basis from alternative providers on certain routes or to serve entire customer locations served by these wire centers. Apart from these fatal shortcomings, these proposals virtually guarantee a 100% false negative impairment determination, *i.e.*, a finding of non-impairment where there is impairment out of 47% of the wire centers that do not have fiber collocations.

SBC similarly proposes to eliminate all DS3 and dark fiber loop and transport UNEs and DS1 transport between wire centers with 10,000 or more business lines and 5,000 or more business lines and DS1 loops out of wire centers that have more than 15,000 business lines.[59] SBC states that its proposal is reasonable because one or more CLECs have deployed its own

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[57] Verizon Comments at 65-66, 82; BellSouth Comments at 39-50.

[58] *See* RBOC "Fact" Report at III-29.

[59] SBC Comments at 76-82, 88-92.

fiber-based collocation in approximately 56% of SBC's wire centers with 10,000 or more business lines and that one or more CLECs have obtained fiber based collocation in approximately 20% of SBC's wire centers with between 5,000 and 10,000 business lines.[60] For wire centers that have more than 15,000 business lines, SBC further explains that there are usually more than 10 lit buildings in those wire centers.[61]

For the same reasons Verizon's and SBC's loop proposals fail, SBC's alternative proposal also should fail. Indeed, it would result in excessive false non-impairment findings because it is based primarily on the notion that CLECs can use special access to compete or that they can justify self deploying DS3 and dark fiber transport routes between these wire centers or that such transport routes are widely available on a wholesale basis (which is not the case). Beyond this, it incorrectly assumes that fiber-based collocators offer DS1 services and fails to show that transport routes between end offices with 10,000 business lines or more and wire centers with more than 5,000 business lines justifies self-deploying facilities for DS1 transport on those routes. Nor does it show that wholesale DS1 transport is available from alternative providers at these wire centers. SBC's 15,000 business line loop proposal is also flawed. It too incorrectly assumes that CLECs can compete using special access and that competitors can justify self deploying DS3 and dark fiber services or that such facilities are widely available on a wholesale basis. Further, it incorrectly assumes that fiber-based collocators that operate out of wire centers with more than 15,000 business lines offer DS1 loops out of those offices and that it

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[60] SBC Comments at 78. SBC also proposes that to the extent the Commission orders unbundling of DS1s between wire centers or to certain locations, it must limit the number of DS1s a CLEC can order on a given route to 8 to prevent CLECs from circumventing any DS3 unbundling limitation that may be established. SBC at 79 n.253 & 89 n.278. SBC maintains that eight DS1 is the cross-over point at which it becomes cost effective to purchase a DS3 instead. The Commission need not adopt such a threshold because to the extent it is more efficient and cost effective to deploy a DS3, CLECs will do so.

[61] SBC Comments at 89.

is cost justified to deploy DS1 loops to customer locations out of those offices. Like the other RBOC proposals, SBC's proposal should be rejected because it is internally flawed and prone to erroneous non-impairment determinations in violation of *USTA II*.

b) Verizon's "Other" Proposals Should be Rejected

Large enterprise customers. Verizon contends that the FCC should impose a national non-impairment finding for service to large enterprise customers, including Fortune 1000 companies and large public institutions,[62] because this market segment is the most competitive. The Commission should reject this proposal, first, because a recent report by the Ad Hoc Users, group invalidates SBC's contention that this market is competitive. This report states that the market for special access services, including switched and dedicated "last mile" connections between IXC networks and local end users remains monopolized by the RBOCs.[63] The Ad Hoc Users Report explains that all signs point to the continuing lack of competitive alternatives for the large user market.[64] It provides data that competitive intramodal choices being provided by CLECs and CAPs address only a small fraction of the total business market for special access services and other forms of local connectivity.[65] Further, there is no basis for a separate impairment finding for this market segment. The Commission may, and should, apply the appropriate impairment test for loops and transport generally to all customer segments.

High Capacity Circuits Used to Transmit Packet-Switched Services. Verizon requests that UNEs not be available for use in providing packet-switched services because competing carriers are leading providers of high-speed packet switched services that make up much of the

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[62] Verizon Comments at 67-69; see also RBOC UNE Fact Report III-32.

[63] Ad Hoc Users Report at 11-26.

[64] *Id*.

[65] *Id*.

demand for enterprise customers. Verizon is basically asking that the Commission impose a use requirement on UNEs. However, this would be unlawful because under the Act and FCC rules, CLECs are entitled to "nondiscriminatory access to network elements on an unbundled basis."[66] Therefore, the Commission could not lawfully impose the requested use restriction.

MSAs where competitive facilities providers are located and can supplement their facilities and serve customers using special access. Verizon urges the Commission to eliminate unbundling of DS1, DS3 and dark fiber UNEs in MSAs where it has received special access pricing flexibility. The Commission has already found, however, that the test for pricing flexibility is unrelated to impairment.[67] The Commission should reject the Verizon's request for all the reasons previously stated by the Commission in the *TRO*.

c) Qwest's Proposal Should Be Rejected

Qwest requests the Commission to: (1) Prohibit CLECs from converting existing special access to high capacity loop or transport UNEs; (2) Not base an impairment finding on the differences between TELRIC and special access prices; (3) Not permit CLECs to obtain addition UNE loop or transport facilities on a given route; (4) Not allow CLECs that are already purchasing special access loops or transport from a given wire center to obtain UNEs from that wire center; and (5) Not require loops and transport be unbundled out of wire centers that the RBOC offers special access services. Because these requests are based entirely on the presumption that special access justifies a non-impairment finding (which for the reasons explained below is not the case), they do not warrant consideration.

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[66] Pursuant to 251(c)(3), CLECs are entitled to "nondiscriminatory access to network elements on an unbundled basis…on rates, terms, and conditions that just, reasonable, and nondiscriminatory." In addition, pursuant to 47 C.F.R. § 51.309(a) the Commission's rules provide that an "ILEC shall not impose limitations, restrictions, or requirements on the use of unbundled network elements."

[67] TRO at ¶ 104.

2. Alternatively, the ALTS Proposal Should be Adopted

Assuming the Commission does not reinstate the previous triggers for DS-3 transport, we urge the Commission to adopt the three-tiered approach suggested in initial comments filed by McLeodUSA and ALTS that uses business access lines in RBOC central offices on each end of the transport route as a reliable proxy for when non-RBOC DS3 transport is economically feasible or currently available.[68] For all the reasons stated in ALTS' comments, this approach fully addresses the concerns of *USTA II* while accurately identifying impairment.

Even with this approach, the impact on CLECs will likely be substantial. McLeodUSA would lose access to more than 22% of its DS3 UNE transport routes under this bright line test. For those routes, McLeodUSA would be required to seek out non-RBOC wholesale options, where they exist, or purchase DS3 transport from the RBOC at special access pricing. On average, that means McLeodUSA would face a 200% increase in transport costs in areas where it is forced to special access, and slightly less where alternative providers can be found.

VI. RULES CONCERNING A BATCH HOT CUT PROCESS SHOULD BE IMPLEMENTED TO ENSURE AN ORDERLY TRANSITION FROM UNE-P TO UNE-L AND PROMOTION OF INTRAMODAL, FACILITIES-BASED COMPETITION

As discussed in our initial comments, an economic and efficient hot cut process is essential to ensure an orderly transition from UNE-P to UNE-L. A batch hot cut process that lowers the monthly recurring charges and significantly reduces the non-recurring charges for installing unbundled loops is the most efficient and logical remedy. The RBOCs must be able to accurately and efficiently switch large volumes of customers to facilities-based competitive providers that use unbundled loops at a reasonable charge. Indeed, in the *TRO*, the FCC noted

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68 ALTS, *et al*. Comments at 77-86.

the hot cut process could be improved if cut overs were done on a bulk basis, such that the timing and volume of the cut over is better managed.[69]

McLeodUSA urges the Commission to create rules establishing minimum federal standards for a hot cut process to ensure consistency across markets. Thereafter, the states could apply these standards in a similar fashion to application of the section 271 checklist state proceedings on RBOC entry into the long distance market. The scope of these standards should include (1) UNE-P to UNE-L with Local Number Portability (LNP) order types (encompasses both a CLEC's own UNE-P to UNE-L conversion, *plus* a 3rd party carrier's UNE-P to UNE-L); (2) resale to UNE-L with LNP order types; (3) Resale to UNE-L with LNP order types; (4) RBOC retail to UNE-L with LNP order types; and (5) CLEC to CLEC order types. The batch hot cut process must also be scaleable and apply to and handle the volume of migrating both embedded base plus all UNE-L orders for *new* customers. McLeodUSA suggests creating specific guidelines for the reasonable size of a batch is necessary and suggests a batch of 100 to 125 orders per CLEC per Central Office per day is reasonable. Furthermore, the FCC should establish TELRIC benchmark pricing for the batch hot cut process. While the FCC cannot set pricing, it would be helpful to CLECs like McLeodUSA if the FCC provided states with certain proxy as to the reasonable prices for both recurring and non-recurring charges associated with the hot cut process for each RBOC. These proxy prices should properly reflect that batch hot cut pricing should reflect efficiencies that are gained through volumes of completed batch hot cuts, such that batch hot cut pricing should decline over time as both the CLECs and a RBOC presumably achieve process efficiencies over time. Such a pricing structure would help promote facilities-based competition by encouraging CLECs to convert more customers to UNE-L

69 *TRO* at ¶ 474.

service. The pricing voluntarily offered by Qwest to MCI in its region of $25 is a good starting point for a proxy price. In order to ensure vibrant intramodal, facilities-based competition, efficient and economical batch hot cut processes are critical to transition customers to UNE-L.

VII. SPECIAL ACCESS IS IRRELEVANT TO AN IMPAIRMENT ANALYSIS

A. The Act Requires that UNEs Be Cost Based - Special Access Fails That Test

Congress could have considered special access as a means for competitors to enter the telecommunications market when it enacted the 1996 Act. Indeed, by 1996, RBOCs had been providing special access to long distance and large enterprise customers for more than 10 years. Congress, however, chose to require that the RBOCs provide UNEs at prices "based on cost" and on "nondiscriminatory" terms and conditions.[70] This requirement is clear and unambiguous. No provisions in the Act contemplate that a CLEC could compete with the RBOCs using special access; otherwise, there would have been no need to require the unbundling of loops and transport--and as such, special access should not be considered by this Commission in its impairment analysis.

It is also important that the Act only discusses special access in the context of providers of long distance and information services.[71] Indeed, several sections of the Act illustrate Congress' intent that competitors would use UNEs, not special access, to enter the market. In addition to sections 251(g) and 272(e) (discussed in note 2 below), the section 271 competitive checklist requires compliance with section 251(c) unbundling, but does not provide any similar

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[70] *See* 47 U.S.C. §§ 252(d), 251(c)(3).

[71] *See* ALTS, *et al*. Comments at pp. 10 – 11 (noting that Section 251(g) preserves equal access and nondiscrimination regulation applicable to "exchange access, information access and exchange services" purchased by "interexchange carriers and information service provides." 47 U.S.C. § 251(g). Furthermore, the provision of *telephone exchange service and exchange access* is subject to nondiscrimination obligations in section 272(e), a provision that establishes structural separation for BOC in-region interLATA telecommunication and information services.

requirements for special access. Congress' requirement that RBOCs provide UNEs as a precondition to the provision of in-region interLATA long distance service evidences Congressional intent that UNEs, not special access, would be the means by which CLECs compete in the market.[72]

Therefore, the clear and unambiguous language of the Act requires that this Commission find that special access is irrelevant to the Commission's impairment analysis. The Commission should be guided by the language of the Act which prescribes that the Commission first determine if CLECs are impaired without access to a network element and, if so, then apply cost-based TELRIC pricing.

B. The RBOCs Ignore the Likelihood of a Price Squeeze on CLECs

As discussed in McLeodUSA's initial Comments, special access does not adequately protect against price squeeze behavior by the RBOCs. Notably, none of the RBOCs address the likelihood of a price squeeze in the event that CLECs only have access to special access services. Rather, the RBOCs simply claim that special access is competitively priced and use of special access by CLECs demonstrates that CLECs are not impaired without UNES.[73] The RBOCs failure in their comments even to address this obvious argument confirms the validity of the point that the possibility of a price squeeze precludes special access as an alternatives to UNEs.

In other proceedings, the FCC has recognized the importance of UNEs as form of protection from RBOC price squeezes. For instance, in the *LEC Classification Order*[74], the FCC addressed the possibility of RBOC price squeezes in the context of RBOC in-region entry into

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[72] *Id*.

[73] Verizon Comments at 62; BellSouth Comments at 37; SBC Comments at 62, Qwest Comments at 65.

[74] *See* Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate Marketplace, Second Report and Order, 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*").

the interLATA long distance market and noted that the risk of such discrimination could be addressed by a combination of separate affiliate requirements, price cap regulation of RBOC exchange access services and the "ability of competing carriers to acquire access through the purchase of unbundled network elements."[75]

To emphasize this point again, if CLECs were required to rely exclusively on special access, RBOCs would have the ability and incentive to discriminate against by price squeeze behavior. Indeed, none of the protections the FCC has relied upon in the past to protect carriers from BOC price squeezes apply in the CLECs' markets. The separate affiliate requirements and affiliate transaction rules do not apply to RBOCs who provide local exchange, exchange access and, in almost all cases, broadband services on an integrated basis. In addition, RBOCs enjoy pricing flexibility for special access in many MSAs where, consequently, price cap and service quality regulations provide little, if any, protection to CLECs from price squeezes. For instance, when an RBOC receives Phase II pricing flexibility, all regulatory constraints on special access prices effectively are removed because the RBOC may file tariffs for its special access services without any price justification based either on cost or compliance with price caps.[76] While CLECs are treated similarly, they do not control last mile facilities and therefore do not have the ability to raise essential input prices to competitors.

1. RBOCs Do Not Have Same Price Squeeze Incentives For CMRS Carriers

Moreover, even assuming that the RBOCs have not heretofore engaged in price squeeze behavior with respect to CMRS carriers, this is irrelevant for purposes of considering the

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75 *LEC Classification Order* at ¶ 126; *see also* Comments of ALTS, et al, p. 20, n.18 (noting the special emphasis that the FCC placed on the availability of UNEs to partially protect CLECs from a price squeeze; *see also* Comments of ALTS *et al*. at 19-23.

76 *See generally Pricing Flexibility Order*.

likelihood of a price squeeze on CLECs. RBOCs do not have the same incentives to engage in price squeeze behavior with respect to CMRS and long distance carriers because the RBOCs would be harming their partially or wholly-owned affiliates that provide service in those markets. For instance, SBC owns 60 percent of Cingular, while Bell South owns the other 40%, and Verizon owns 55 percent of Verizon Wireless. Similarly, Qwest owns 100 percent of its CMRS resale operations, which are provided through Sprint PCS. Accordingly, the CMRS market is quite different from the wireline market as these ownership interests reduce the likelihood that RBOCs would engage in price discrimination. Further, as noted by others, since the RBOC-affiliated CMRS providers must offer service in the territories of the other BOCs and those RBOCs have their own affiliated CMRS operations, all of the RBOCs are less likely to engage in price discrimination in the CMRS market because of the fear of retaliation by their BOC counterparts.[77] Since the RBOCs have not entered out-of-region wireline markets, there is no threat of retaliation by other RBOCs for price discrimination against wireline CLECs.

The financial strength of unaffiliated CMRS carriers also reduces the likelihood that the BOCs could successfully engage in price discrimination in the CMRS market. CLECs, on the other hand, do not have the record of financial strength in the wireline market and thus, are susceptible to BOC price squeezes.

And, as noted by AT&T, special access only represents a very small amount of a wireless carrier's total operating costs and is a much smaller fraction of their overall costs than what wireline carriers incur in purchasing loops and transport to provide local exchange service. Because of the relatively lighter use of special access by CMRS carriers, than would be required

[77] *See* ALTS *et al*. Comments at 15.

by CLECs absent UNEs, the RBOCs do not have an ability to price squeeze CMRS carriers to the same degree as wireline carriers.[78]

Moreover, when a wireline carrier purchases special access in the form of a loop or an EEL, it is generally specifically designed to serve an individual customer. Thus, if the carrier loses that customer, it no longer needs the special access circuit. In contrast, the loss or addition of a single customer generally does not affect a CMRS carrier's special access purchases.[79] CLECs that would enter into long term contracts for special access could be particularly harmed when they loose a customer because they would be obligated to continue to pay for the circuit or be subject to termination penalties**.** Accordingly, special access is a fixed cost for CMRS carriers and thus a price squeeze will not affect these carriers in the same way it will affect a wireline carrier whose reliance on special access is not fixed, but rather, fluctuates and is dependent on individual customers.[80]

2. RBOCs Do Not Have the Incentive or Ability to Engage in Price Squeeze Behavior With Respect to IXCs

For many of the same reasons, the BOCs do not have the incentive or the power to discriminate against long distance carriers. The Commission has noted that IXCs and large businesses that purchase large amounts of special access are unlikely to be affected by RBOC price discrimination because these businesses generate significant revenues for the ILEC, and as such, they have bargaining power with respect to the RBOCs.[81] CLECs do not enjoy such bargaining power.

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78 *See* AT&T Comments at 125, 126.

79 *Id*.

80 *Id*. at 126, 127

81 *See Pricing Flexibility Order,* at ¶ 142.

C. RBOC Created Barriers To UNE Access Preclude Reliance on Special Access As a Substitute for UNEs

In their Comments, each of the RBOCs make much of that fact that CLECs are using special access to provide services and much of the RBOCs' special access revenues comes from CLECs.[82] The BOCs also allege that many CLECs are using special access services more extensively than UNEs.[83]

When analyzing these statistics and arguments, the Commission must consider the underlying reason why a number of CLECs are using special access. Simply put, CLECs have no other choice. The Commission already has determined that Verizon's "no facilities" policy is unlawfully discriminatory. Nevertheless, Verizon blatantly has ignored the Commission's determination and continues to refuse to perform routine network modifications when UNEs are requested. Furthermore, the RBOCs continue to refuse to provide UNE loop-transport combinations and refuse to allow CLECs to commingle UNEs with tariffed services.[84] For these reasons, the current marketplace use of special access cannot be characterized as reflecting competitive forces and, therefore, the Commission may not lawfully draw any conclusions regarding impairment based on any CLECs use of special access.

D. Current Pricing of Special Access is Irrelevant

In its comments, Verizon argues that special access is competitively priced as evidenced by the decrease in the *average* revenue per special access line sold by the BOCs during the period of pricing flexibility.[85] Similarly, SBC claims its evidence shows that special access is

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[82] SBC Comments at 54; Qwest Comments at 75; Verizon Comments at 66.

[83] Comments of SBC at 59, Comments of Verizon at 55.

[84] *See generally* ATX, *et al*. Comments at 9-10.

[85] Verizon Comments at 62,63.

competitively priced and that CLECs have been successfully competing for all kinds of customers using special access that is purchased at deep discounts off the tariffed base rates.[86]

Assuming *arguendo* that the BOCs' figures are correct, the *current* pricing for special access is largely irrelevant because, as explained above, absent UNEs RBOCs could and would raise special access prices in order to create a price squeeze on CLECs.

Furthermore, the fact that special access can be purchased at rates deeply discounted from tariffed prices has no bearing on impairment.[87] For instance, the special access term and volume discounts provide discounts to only the largest carriers such as AT&T, MCI and Sprint who have the requisite level of traffic and customers to take advantage of these discounts. Indeed, for most CLECs, term and volume discounts for special access are not a reality. Volume is frequently too small to qualify for a discount. And, CLECs are frequently not able to make term commitments because they cannot get similar term commitments from the small business customers to whom they typically provide service.

The Commission should note that these term and volume discounts, contrary to the goals of the Act, stifle future investment and serve as a deterrent for facilities-based investment because CLECs who have been locked into volume and term arrangements are unable to shift to their own facilities.

Verizon and SBC also argue that special access prices have declined recently. Verizon states that based upon <u>its</u> analysis of the *average* revenues it earns per DS1 special access line,

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[86] SBC Comments at 62.

[87] Verizon Comments at 62; SBC Comments at 67; Qwest Comments at 70 (claiming that term commitments provide significant discounts to CLECs).

Verizon's special access rates have declined since 2001.[88] The Commission should be skeptical of these figures. First and most important, the figures used by Verizon and the analysis conducted by its chosen expert, Mr. William E. Taylor, only account for an *average* of the RBOCs' special access revenues. The declining numbers cited by Verizon and Mr. Taylor can be attributed to the fact that certain large carriers and large business customers have entered into long-term discounted plans, thereby reducing the *average* prices for special access lines. However, average reductions based on volume discounts for large customers mask rate increases experience by smaller CLECs, such as those Qwest has recently instituted for DS-1s. Average prices should not be considered by the Commission.

Verizon and SBC argue that that the very high rates-of-return that RBOCs earn on special access should be disregarded because such rates are based on ARMIS data reported by the RBOCs.[89] In fact, ARMIS data is perfectly appropriate for calculating rates-of-return. The fact that BOCs have not offered other data or otherwise volunteered their rates-of-return on special access verifies that these rates are essentially unconscionable. As pointed out by the Ad Hoc Users Report, the rates for special access have generally increased over the years as BOCs have been granted pricing flexibility to amounts unreasonably in excess of cost.[90] These rates-of-return preclude reliance on special access as a substitute for UNEs.

Finally, both Verizon and SBC argue that small carriers can avail themselves of the special access discounts by buying from aggregators.[91] Verizon states that CLECs can obtain the

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[88] Verizon Comments at 62-63, Taylor Dec. ¶ 12 (stating that both RBOC and Verizon special access revenue have continued to decline in nominal and real terms and at a faster rate during the period in which limited pricing flexibility has been available to these companies in certain areas).

[89] Verizon Comments at 62, 63; SBC Comments at 63.

[90] *See, e.g.*, Ad Hoc Users Report at 27-40.

[91] Verizon Comments 37, 64-65; SBC Comments at 67.

"maximum discounts contained under Verizon's tariffs by purchasing service from one of the several aggregators that assist CLECs to obtain access to each other's networks, and to aggregate their demand in order to obtain access to RBOC special access at substantial discounts."[92] However, inserting intermediate carriers into the equation does not make if possible for the Commission to rely on special access as a substitute for UNEs. For example, absent UNEs, BOCs would have the same incentive and ability to engage in price squeeze behavior towards aggregators and their customers as against CLECs directly. Similarly, aggregators do not cure BOCs unlawful policies of discouraging use of UNEs.

For all of the reasons discussed above, the Commission may not on special access as an alternative to UNEs in its impairment analysis.

VII. DS1 EELS SHOULD BE TREATED AS A SEPARATE UNE

In the *TRO*, the Commission established "architectural" safeguards to assure that EELs carried a significant amount of local traffic. [93] SBC now proposes that the Commission modify its architectural safeguards to restrict the availability of EELS.[94] In particular, SBC requests the Commission modify the following: (1) the ratio of one DS1 trunk for every 24 DS1 EELs should be 1 DS1 Trunk for every 5 DS1 EELs; (2) that CLECs certify that *all* traffic over the EEL is local traffic; and (3) that these architectural safeguards apply to stand alone loops and transport or any such facilities that are commingled with special access.[95]

The Commission should reject these proposals which are essentially an unsupported wish list. SBC has not provided any basis for the Commission to depart from its finding in the *TRO*

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92 Verizon Comments at 64.

93 *TRO* at 603-611.

94 SBC Comments at 97-99.

95 *Id*.

that "[t]he 24-to-1 EEL to interconnection trunk ratio provides a reliable gauge that the CLEC exchanges local traffic with the RBOC in a manner that indicates that it is a bona fide provider of local voice service."[96]

Requiring CLECs to provide 100% local service over EELs would, in effect, require CLECs to establish two separate networks one for local and one for long distance service. This would be administratively and economically infeasible. Moreover, providing EELs on this basis would violate RBOCs obligations under Section 251(b)(3) to provide network elements on a nondiscriminatory basis since RBOCs do not operate such separate networks. There is no basis to apply EEL standards to stand alone network elements. The RBOCs' concern that IXCs would be able to use EELs as a substitute for special access does not apply to stand alone elements as it would be impractical for any carrier to use stand alone network elements as a substitute for special access.

Third, the availability of EELs under current rules promotes investment by competitors. As noted by the Commission in the *TRO*, EELs promote facilities-based competition and innovation.[97] In particular, EELs allow competitors to expand their network footprint and offer a competitive choice to more consumers, especially outside of large cities or highly populated areas, thereby providing additional benefits to consumers that otherwise may not receive them. Moreover, EELs allow competitors to leverage their facilities-based investment by eliminating unnecessary collocation arrangements at end offices where the CLEC's number of customers does not justify such arrangement, thereby allowing competitors to efficiently and cost-

[96] *Id*. at 608.

[97] *TRO* at 364.

effectively serve a greater number of consumers.[98] Finally, the availability of EELs creates incentives for competitors to make further rational, investment in facilities and deployment of advanced networks.

For all these reasons, the Commission should reject SBC and other RBOC requests to thwart the availability of EELs.

VIII. CLECS ARE IMPAIRED WITHOUT ACCESS TO ENTRANCE FACILITIES

BellSouth argues that entrance facilities should not be considered a "network element," and even if they were a network element, the Commission should find that competitive providers are not impaired with respect to them .[99]because entrance facilities are the most competitive type of transport link, because BOCs have no competitive advantage over the CLEC in building them, and because CLECs have been steadily replacing entrance facilities obtained from BOCs with their own competitive transport.[100] RBOCs request that the Commission establish a nationwide finding of no impairment for entrance facilities.

USTA II, in effect, has already rejected BellSouth's claim that entrance facilities are not network elements under Section 153(29) of the Act when it found that the Commission's reasoning for excluding entrance facilities as network elements "appears to have little or no footing in the statutory definition."[101] Accordingly, entrance facilities are correctly considered part of the RBOC network and are subject to unbundling if CLECs are impaired without them.[102]

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98 *Id*. at 576.

99 BellSouth Comments at 51, 55. See also SBC Comments at 70; Verizon Comments at 80-81.

100 *Id*.; BellSouth Comments at 54.

101 *USTA II*, 359 F.3d at 586.

102 *Id.*

In fact, there is no basis for treating entrance facilities differently from dedicated transport or loops. The Commission should apply the same impairment test and the appropriate triggers, which will confirm that there are not ample competitive alternative providers. Consequently, McLeodUSA urges the Commission to find that CLECs are impaired without access to entrance facilities.

IX. STATES HAVE AUTHORITY TO ORDER UNBUNDLING

A. States May Set Prices For 271 UNEs

RBOCs argue that state commissions may not regulate section 271 elements because under Section 271(d)(3) the authority to regulate these elements is delegated exclusively to the Commission and not to the states.[103] RBOCs also argue that Congress did not reserve any jurisdiction to the states to regulate rates, terms and conditions of section 271 UNEs and any such attempts should be preempted.[104] Both arguments are incorrect.

Nothing in the statute provides that the Commission has exclusive jurisdiction to set section 271 UNE rates. Under section 271(d)(3), only the Commission can "determine[]" whether to approve or deny a RBOC's application to offer interLATA long distance service. Once an application is granted, the Commission may under the statute (presumably after receiving a section 271 complaint) "determine" if a BOC has ceased to meet any of the conditions required for the approval of its application and may order the BOC to correct the deficiency, impose penalties, or suspend or revoke such approval.[105] However, a state setting market-based prices for section 271 UNEs does not constitute the grant of an application or the resolution of a section 271 complaint.

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103 BellSouth Comments at 77-81, SBC Comments at 114-118.

104 SBC Comments 116-117.

105 *See* 47 U.S.C. § 271(d)(6).

Moreover, the 1996 Telecom Act expressly preserved state authority over intrastate communications. In particular, the Communications Act of 1934 establishes a system of dual state and federal regulation over telephone service, where the Commission is generally forbidden from entering the field of intrastate communication service, which remains the province of the states.[106] The Commission's ability to preempt state regulation of intrastate telephone service is limited. It would unlawful for the Commission to preempt state commissions from exercising their section 152(b) authority and setting prices for 271 UNEs for intrastate service, because nothing in section 271 expressly prohibits states from doing so. Therefore, because the '96 Act does not expressly reserve to the Commission the exclusive role of setting post-271 pricing, states should retain the authority to set prices for Section 271 UNEs.

B. Independent 271 Unbundling Obligations Remain

Shortly after the issuance of the *TRO*, RBOCs inundated the Commission with a flurry of petitions for forbearance from imposing 271 obligations on "broadband" or "next generation" elements. In their submissions, RBOCs provide no new support for the relief they seek but instead simply request the Commission to grant each of their respective repetitive petitions for forbearance.[107] As noted by numerous parties in the respective proceedings, the BOCs have failed to meet the statutory standards for forbearance and their petitions should be summarily dismissed.[108]

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106 ATX *et al*. Comments at n. 152.

107 BellSouth Comments 70-77, SBC Comments 109-110, Verizon Comments at 143.

108 *See e.g., In the Matter of New Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Comments of Allegiance*, et. al*, CC Docket 01-338, filed November 17, 2003*;*and *In the Matter of Bellsouth Telecommunications Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, Opposition of Cbeyond Communications *et. al.*, CC Docket 04-48, filed March 15, 2004.

The premise of such petitions, i.e., that removal of an element from the Section 251 UNE list requires removal from the Section 271 checklist, is false. The Commission has previously considered and rejected this argument in the TRO by finding that Section 271 imposes obligations on RBOCs that are "independent of, and go beyond," those obligations imposed by Section 251 on RBOCs.[109] The FCC should reaffirm its prior conclusion.

CONCLUSION

The Commission should conclude this proceeding, in accordance with the recommendations herein and as set forth in McLeodUSA's initial comments, by year-end.

[109] *TRO* at ¶ 653.

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